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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1221

STATE OF WISCONSIN, Appellant,

v.

NORMA GRACE CONSTANTINEAU, Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Wisconsin is reported at 302 F. Supp. 861 (1969) and is set forth in A. 114-123.

JURISDICTION

This cause of action was brought under 28 U.S.C. 2281 and 2284, to enjoin the actions of Police Chief Grager taken pursuant to secs. 176.26 and 176.28 (1), Wis. Stats. The order

of the three-judge District Court was entered on November 25, 1969 (A. 124). Notice of Appeal was filed in that Court on December 24, 1969. The jurisdiction of the United States Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. 1253 and 2102 (b). This case was docketed on February 21, 1970 and probable jurisdiction was noted on March 23, 1970.

QUESTIONS PRESENTED

(1) Do secs. 176.26 and 176.28 (1), Wis. Stats., violate the procedural due process requirement of Amendment Fourteen, Section 1, United States Constitution?

(2) Did the lower court err in refusing to allow appellant to call witnesses and elicit testimony at the hearing on defendant's and appellant's motion for judgment on the pleadings, at which hearing it was agreed that the sole issue for determination was the constitutionality of secs. 176.26 and 176.28 (1), Wis. Stats.?

(3) Did the lower court err in basing its opinion of August 13, 1969, that secs. 176.26 and 176.28 (1), Wis. Stats., were unconstitutional upon an assumption that appellee would be exposed to "unfounded public defamation, embarrassment, and ridicule" by the operation of said Wisconsin Statutes, when no such facts appeared in the record nor were they correct in fact?

STATUTES INVOLVED

Secs. 176.26 and 176.28 (1), Wis. Stats., are involved in this case and are set forth at A. 116-117.

STATEMENT

The Appellee, Norma Grace Constantineau, is an adult resident of the City of Hartford (1960 population: 5,627. U. S. Census, 1960), (A. 102). The defendant below, James W. Grager, is Chief of Police of the City of Hartford, Wisconsin (A. 103).

On January 23, 1969, Mr. Grager, in his capacity as Chief of Police of Hartford, Wisconsin, and acting pursuant to secs. 176.26 and 176.28 (1), Wis. Stats., posted a Notice in all of the retail liquor outlets in the City of Hartford (A. 103). This Notice, a copy of which is set forth at A. 106-107, informed the notified persons or establishments that they were forbidden "to sell or give away to Norma Grace Constantineau any intoxicating liquors of whatsoever kind for a period of one year from date, under pain of the penalties provided by Sections 176.26 and 176.28 (1) of the Wisconsin Statutes." (A. 106)

Appellee Constantineau then began this action in the United States District Court for the Eastern District of Wisconsin by effecting the service of a summons and complaint upon Chief Grager on January 31, 1969. (R. 7-8). A claim for damages under 28 U.S.C. 1343 (3) and 42 U.S.C. 1983 was asserted in the first cause of action; in the second cause of action, Mrs. Constantineau requested the convening of a three-judge court under 28 U.S.C. 2281 to enjoin Chief Grager's actions on the ground that secs. 176.26 and 176.28 (1), Wis. Stats., were unconstitutional. (A. 102-106.)

Chief Grager answered the first cause of action and moved to separate it from the second cause of action (R. 13-16). A pre-trial conference was held on March 25, 1969, before The Honorable John W. Reynolds, United States District Judge for the Eastern District of Wisconsin (R. 24). At this pre-trial conference, the State of Wisconsin moved to intervene as a defendant in the second cause of action (R. 19-23). The State also moved to separate the two causes of action and it joined with Chief Grager in moving for judgment on the pleadings (R. 25). In its Order following this pre-trial conference, the Court granted the motion of the State of Wisconsin to intervene as a party defendant in the second cause of action (R. 24). The Court also separated the two causes of action and noted that the sole issue for determination of defendants' motion for judgment on the pleadings was whether secs. 176.26 and 176.28 (1), Wis. Stats., were on their face constitutional (R. 25). The Court ordered that this constitutional question should be decided by a three-judge court before the first cause of action was heard. (R. 25).

A hearing on this constitutional question was held before the three-judge panel on June 6, 1969 (A. 115), at which hearing the State of Wisconsin's motion to present witnesses was denied (A. 112; Jurisdictional Statement, 14a-16a). On August 13, 1969, the three-judge court issued its opinion (A. 114-123), United States Senior Circuit Judge Duffy dissenting (A. 120-123), holding that the Wisconsin statutes in question were on their face unconstitutional. The Court entered its order on November 25, 1969 (A. 124). Appellant State of Wisconsin filed its Notice of Appeal to the United States Supreme Court on December 24, 1969. This case was docketed on February 21, 1970 and probable jurisdiction was noted on March 23, 1970.

SUMMARY OF ARGUMENT

Due process is a flexible concept, varying with the time, place and circumstances to which it is being applied. In order to determine the requirements of due process in any given circumstance, the private interest affected should be weighed against the governmental interest involved. *Cafeteria & Restaurant Workers v. McElroy,* 367 U.S. 886 (1961).

Applying this balancing of interests test to the right to purchase alcoholic beverages, the statutes in question satisfy due process without providing for notice and a hearing. Both the majority and the dissenting judge below agree with this conclusion. (A. 117-118, 120-123). The states traditionally have possessed a great police power over alcoholic beverages, while the right of individuals to obtain alcoholic beverages has received little, if any, recognition at law. *Crane v. Campbell,* 245 U.S. 304 (1917).

Matters concerning possible damage to the reputation of an individual posted under these statutes were not before the lower court. Mrs. Constantineau's second cause of action, which was the only one before the lower court, did not allege damage to her reputation, nor did she allege possible reputation damage as a ground for finding these statutes unconstitutional (A. 102-106). Secondly, Mrs. Constantineau's counsel asserted before the lower court only his client's right to obtain alcoholic beverages and her right to procedural due process. United States District Judge Reynolds admitted that this matter of reputation damage "has not been mentioned" (A. 113). The lower court denied the State's attorney's motion to call witnesses (A. 111-112) who could have discussed such matters (Jurisdictional Statement, App. D, 14a-16a).

Even if matters concerning reputation damage were properly before the lower court, that court decided these

matters erroneously because it is unlikely that any such damage would occur from the operation of these statutes. Secondly, matters of reputation have only been considered in terms of due process when any likely damage to reputation has been alleged or shown to be likely to affect the individual's economic future, such as by diminishing his ability to secure future employment. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898-899 (1961). Courts have only so considered reputation damage when specific allegations or evidence were before them that future economic losses were likely to occur. For example, see *Birnbaum v. Trussell*, 371 F. 2d 672, 677-679 (C.A. 2, 1966). No such evidence or allegations of likely future economical loss were before the lower court in this case. When courts have noted that such evidence or allegations of likely future economic loss were not present, they expressly have not considered reputation damage in determining the requirements of due process. *Parker v. Board of Education of Prince George's County, Md.*, 237 F. Supp. 222 (D. Md., 1965), aff'd per curiam, 348 F. 2d 464 (C. A. 4, 1965), cert. denied, 382 U.S. 1030 (1966), rehearing denied 383 U.S. 939 (1966).

In determining the requirements of due process in a given circumstance, consideration must be given to the alternatives available both to the State and to the posted individual. *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 163 (1960) (concurring opinion of Justice Frankfurter). In passing these statutes, the State chose a reasonable and restrained means of achieving a legitimate goal of its police power, namely, that of limiting the noxious effects of excessive drinking by certain individuals. The reasonableness of these statutes is reflected in part by the fact that fifteen other states have similar statutes (Jurisdictional Statement, App. D, 17a-30a). The posted individual has numerous alternatives available to him upon being posted, including seeking judicial review of

the posting official's actions by common law writ of certiorari or bringing an action, such as Mrs. Constantineau's first cause of action (A. 102-106), against the posting official for punitive and compensatory damages. Such an action could be brought either in Federal court or in state court. A posted individual may also have informal remedies against any action taken under the statutes in question either through the issuance of a statement to the press or through political action.

Wisconsin's posting statutes satisfy the requirements of due process upon an application of the *Cafeteria Workers*, supra, balancing of interests test. Recent cases in which this test was applied reveal fact situations in which government action taken without notice and a hearing was upheld even though the private interests involved were more substantial than in this case and/or the government's interests were not as great as in this case. See, for example, *Fugazy Travel Bureau, Inc. v. Civil Aeronautics Board*, 350 F. 2d 733 (C.A., D.C., 1965). Based upon the facts in this case and upon the application of the balancing of interests tests in these recent cases, it follows logically that these statutes also meet the requirements of due process.

The Court should also consider, in determining the requirements of due process in this case, the interest of the State in the economical and practical operation of its everyday affairs. The State should be able to take certain low-level actions which only minimally affect the rights of its private citizens, such as the actions capable of being taken under the statutes in question, without having to provide notice and a hearing.

ARGUMENT

I

THE INTEREST OF THE STATE IN REGULATING ALCOHOLIC BEVERAGES SO OUTWEIGHS THE INTEREST OF THE INDIVIDUAL IN OBTAINING ALCOHOLIC BEVERAGES THAT DUE PROCESS DOES NOT REQUIRE NOTICE AND A HEARING WHEN THE LATTER RIGHT IS WITHDRAWN.

Secs. 176.26 and 176.28 (1), Wisconsin Statutes (A. 116-117) grant to certain local officials the power to make a finding that a person is an excessive drinker and that his [or her] excessive drinking is detrimental to himself, his family, or to the community. The local official, upon making such a finding, may then send a notice to anyone whom he feels ought not sell or give alcoholic beverages to the person found to be an excessive drinker. This notice (see A. 106-107 for the notice utilized in this case) informs its recipients that they are thereafter forbidden to sell or give alcoholic beverages to the person named in the notice. Penalties are set forth for anyone who sells or gives alcoholic beverages to a "posted" person after having received such a notice. While the posted person must receive a copy of the posting notice, notice of intention to post and a hearing are not provided in the statutes. The appellee in this case, Mrs. Norma Grace Constantineau, was posted under the above sections of the Wisconsin statutes. The issue before the Court is whether this statutory scheme of posting provides procedural due process as required by the Fourteenth Amendment to the United States Constitution.

The requirements of due process vary with the circumstances to which the concept is applied.

"... The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. [Citing cases.] ' "[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions ....' *Joint Anti-Facist Refugee Committee v. McGrath,* 341 U.S. 123, 162, 163, 95 L.Ed. 817, 848, 849, 71 S.Ct. 624 (concurring opinion).

"As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action...." *Cafeteria & Rest. Wkrs. U., Local 473 v. McElroy,* 367 U.S. 886, 895 (1961).

The precise issue before the Court is whether Wisconsin's alcoholic posting statutes meet the requirements of due process when the interests of the State are weighed against the interests of the posted individual. In *Joint Anti-Facist Refugee Committee v. McGrath,* 341 U.S. 123 (1950), Mr. Justice Frankfurter, concurring, spelled out some of the factors to be considered in determining the requirements of due process in any given circumstance.

"... The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished--these are some of the considerations that must enter into the judicial judgment." (341 U.S. at 163).

It is the position of the State that its alcoholic posting statutes satisfy due process when the governmental interest in regulating alcoholic beverages is weighed against the individual's interest in obtaining such alcoholic beverages.

The states have traditionally possessed a great interest in the regulation of alcoholic beverages, due to their noxious and potentially harmful qualities. The cases are replete with eloquent phrases concerning the evils of liquor and the great powers inherent in the states to regulate such liquors.

> "It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evil shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment." *Crane v. Campbell,* 245 U.S. 304, 307 (1917); *Samuels v. McCurdy,* 267 U.S. 188 (1925); *Crowley v. Christensen,* 137 U.S. 86 (1890).

The great common law interest and power of the states over intoxicating liquors was broadened and increased by the passage of the Twenty-First Amendment to the United States Constitution, which states that:

> "Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Twenty-First Amendment broadened the already great common law regulatory power of the states over intoxicating liquors by enabling the states to regulate in instances in which such regulation might otherwise have been prohibited by the commerce clause (art. I, Sec. 8, U.S. Const.). 30 Am. Jur., *Intoxicating Liquors,* § 44, pp. 556-557; 48 C.J.S., *Intoxicating Liquors,* §33, p. 167.

Similarly, just as the State possesses a great regulatory power and interest over alcoholic beverages, the interest of the individual in obtaining alcoholic beverages traditionally has received little, if any, recognition at law.

> "... The right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no state may abridge." *Crane v. Campbell,* 245 U.S. 304, 308 (1917); *Samuels v. McCurdy,* 267 U.S. 188, 194-195 (1924).

Upon weighing the power of the State against the liberty of the individual in respect to the matter of obtaining alcoholic beverages, all three members of the lower court agreed that Wisconsin's posting statutes satisfy the requirements of due process. The dissent of Senior Circuit Judge Duffy (A. 120-123) speaks for itself on this point. The majority below similarly showed its agreement:

> "The issue before this court is not whether a State may regulate the sale or gift of liquor to persons who by their excessive drinking misspend their funds so as to expose themselves or their familes to want or their communities to liability for the support of themselves or their families or endanger their own health or the peace and welfare of their communities. The power of a State to regulate the purchase, sale, or gift of intoxicating liquors within its borders is well established. Because of the well-recognized noxious qualities of such liquors and the potential extraordinary evil which may result from their misuse, this police power has been held to encompass absolute prohibition as well as severe restriction. *Ziffrin v. Reeves,* 308 U.S. 132 (1939); *Crane v. Campbell,* 245 U.S. 304 (1917)." (A. 117-118)

For the above reasons, Wisconsin's posting statutes meet the requirements of due process, despite the absence of notice and hearing, when the State's interest in the regulation of alcoholic beverages is weighed against the interest of the individual in obtaining such alcoholic beverages.

II

MATTERS CONCERNING A POSSIBLE EFFECT OF WISCONSIN'S POSTING ~~STATEMENTS~~ STATUTES UPON A POSTED INDIVIDUAL'S RIGHT TO BE FREE FROM PUBLIC DEFAMATION WERE NOT BEFORE THE LOWER COURT.

It was the opinion of the lower court majority that:

> "In the instant case, the private interest affected by the statutes is not only the ability of the plaintiff to purchase alcoholic beverages within the City of Hartford, but also the interest of the plaintiff in not being exposed to unfounded public defamation, embarrassment, and ridicule . . . ." (A. 118)

This issue of possible damage to character or reputation by virtue of the operation of Wisconsin's posting statutes was not before the lower court. Mrs. Constantineau's complaint did not allege any damage to her reputation in her second cause of action in which she sought injunctive relief from the three-judge court below. Mrs. Constantineau's assertion of damages to her reputation is found in paragraph 7 of the first cause of action in her complaint (A. 104-105). She expressly realleged in her second cause of action paragraphs 1-6 of her first cause of action (A. 105). She did not, however, reallege paragraph 7 (A. 105). In her first cause of action Mrs. Constantineau asserts damages to her reputation due to the allegedly malicious actions taken by the defendant Chief of Police under the statutes in question. She does not mention the statutes' potential for damaging reputations as a reason why the statutes are unconstitutional (A. 103-104). Potential damages to reputation were, therefore, not alleged in the cause of action before the court. Those damages to reputation which are alleged in the first cause of action assertedly are due to the malicious and arbitrary

actions of defendant Chief of Police and not to the nature of Wisconsin's posting statutes. In *Sessions v. State of Connecticut,* 293 F.Supp 834 (D. Conn., 1968), aff'd per curiam, 404 F. 2d 342 (C.A. 2, 1968), the court considered plaintiff's interest in his reputation as related to the requirements of due process only after noting (293 F. Supp. at 838) the specific allegations in the complaint asserting damage to his reputation.

Not only did Mrs. Constantineau not allege any damage to reputation before the lower court, but her counsel did not argue such damage to the court (Tr. 3-20, 31-32). He steadfastly argued solely for his client's liberty to purchase alcoholic beverages in the City of Hartford and for her right to procedural due process. Mrs. Constantineau's counsel assumed, in arguing before the lower court, that the defendant Chief of Police had acted properly and according to the standards set forth in the statutes. In such a case, Mrs. Constantineau's substantive interests would not be magnified by a claim of a denial of procedural due process.

> "In addition, where substantive statutory standards have been met--or where there are no such standards--and there is no recognized constitutional infringement, the right to procedural due process will not serve to expand substantive rights." Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv.L. Rev. 1439, 1454 (1968).

Counsel for Mrs. Constantineau even argued the need for a further trial on the merits of the first cause of action to determine her claim for damages due to the allegedly arbitrary and malicious actions of the Chief of Police.

> "Mr. Schapiro: . . . We call the court's attention that there is an allegation that the Police Chief acted arbitrarily in bad faith, that he acted willfully and maliciously, and there have been damages. And in that respect, should the Court declare the Statutes un-Constitutional

> or Constitutional, there is still a need for further proceedings in this matter to determine these questions of fact, because should this Court hold the law to be valid, nevertheless if there is an arbitrary act or willful act and damages resulting, we nevertheless have stated a cause of action under the Civil Rights Act, even if the law is valid." (Tr. 19)

It is because of the allegedly arbitrary action attributed to the Chief of Police in the first cause of action that Mrs. Constantineau alleges damage to her reputation and not because of the terms of the statute on its face.

Secondly, Mr. Southwick, the attorney for the State of Wisconsin at the hearing before the lower court, had subpoenaed Mrs. Constantineau to appear at that hearing and had secured the attendance of the Chief of Police of Hartford, Wisconsin (Jurisdictional Statement, App. D, 14a-16a). Mr. Southwick then attempted to call these two persons as witnesses (A. 111-112) for the purpose of giving the court an example of the operation of the posting statutes (Jurisdictional Statement, App. D, 14a). The lower court could then have inquired into the nature of any possible damage to reputation which might be incurred by operation of Wisconsin's posting statutes. The lower court refused to allow any witnesses to be called (A. 112).

U. S. District Judge Reynolds then questioned Mr. Southwick as to the possibility of damage to reputation to one posted under the Wisconsin Statutes (A. 112-114). Judge Reynolds asked:

> "I don't think I am as much concerned about whether or not you can get a drink, go from Hartford to Hartland or some other community, but the fact of being held up to ridicule for reasons which the party may not have any–may not know why. I think this is the right *which has not been mentioned* which bothers me more than–because even during prohibition, everyone [sic] could get a drink, so that's not the problem. (Emphasis added)

". . . .

"I want your personal opinion. Does that seem fair to you?

"Mr. Southwick: It seems fair to me. I think the requirements of due process have been met, Your Honor." (A. 113)

At no place, except during the discussion between U. S. District Judge Reynolds and Mr. Southwick, was the potential for damage to reputation due to the operation of Wisconsin's posting statutes ever mentioned. The trial of the first cause of action which contained Mrs. Constantineau's only assertion of damage to reputation was still pending as U. S. District Judge Reynolds decided to hear the second cause of action involving the constitutional question first (R. 25). U. S. Senior Circuit Judge Duffy never mentioned the question of potential damage to reputation to a posted individual in his dissenting opinion in the lower court (A. 120-123). Despite all of the above, the majority of the lower court concluded:

> "In 'posting' an individual, the particular city official or spouse is doing more than denying him the ability to purchase alcoholic beverages within the city limits. In essense, he is giving notice to the public that he had found the particular individual's behavior to fall within one of the categories enumerated in the statutes. It would be naive not to recognize that such 'posting' or characterization of an individual will expose him to public embarrassment and ridicule, ..." (A. 119)

Neither the State nor Mrs. Constantineau had any notice that matters of potential damage to reputation were before the lower court. Neither party argued these matters nor did either party have notice that such matters would be dispositive of the constitutionality of Wisconsin's posting statutes.

For the above reasons, matters of potential damage to reputation to an individual posted under Wisconsin's posting statutes were not before the lower court. Consequently, the lower court was merely conjecturing when it concluded that

a posted individual's reputation would be affected by a proper application of the statutes.

III

EVEN IF MATTERS CONCERNING POSSIBLE DAMAGE TO REPUTATION OF POSTED PERSONS DUE TO THE OPERATION OF WISCONSIN'S POSTING STATUTES WERE PROPERLY BEFORE THE LOWER COURT, THAT COURT DECIDED THESE MATTERS ERRONEOUSLY.

Possible damage to character and reputation is a proper matter to consider in balancing private interests against governmental interests for the purpose of determining the requirements of due process. *Wiemann v. Updegraff*, 344 U.S. 183 (1952); *Slochower v. Board of Higher Education of City of New York*, 350 U.S. 551 (1956); *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123 (1951); *Birnbaum v. Trussell*, 371 F. 2d 672, 677-679 (C. A. 2, 1966); *Hosack v. Smiley*, 276 F. Supp. 876 (D. Colo., 1967), aff'd per curiam, 390 U.S. 744 (1968).

Such matters of character and reputation have only been considered in connection with the requirements of due process when the potential damage to reputation has been likely to affect the individual's future in an economic sense, such as by affecting his ability to secure employment in the future or his ability to practice a given profession. The individual's interest in protecting his character and reputation is important, in terms of the requirements of due process, as it relates to the economic alternatives remaining to him after the government action in question. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898-899 (1961); *United States v. Lovett*, 328 U.S. 303, 314 (1946); *Schware v. Board of Bar Examiners*,

353 U.S. 232, 238-239 (1967); *Birnbaum v. Trussell*, 372 F. 2d 672, 677-679 (C. A. 2, 1966); *Parker v. Lester*, 227 F. 2d 708 (C. A. 9, 1955), aff'd on rehearing 235 F. Supp. 887 (1956); *Meredith v. Allen County War Memorial Commission*, 397 F. 2d 33, 36 (C.A. 6, 1968); *Heckler v. Shepard*, 243 F. Supp. 841, 847 (E. D. Idaho, 1965).

While it is unlikely that a posted individual's reputation would be damaged by the proper application of Wisconsin's posting statutes, it is even more unlikely that any such possible damage to reputation would specifically damage his future economic opportunities. The statutes merely state that when a specified local official makes a finding that an individual has by excessive drinking (1) misspent or wasted his estate so as to expose himself or his family to want, or the community to which he belongs to liability for the support of himself or his family, or (2) has injured or endangered the loss of his health, or (3) has endangered the personal safety of any other person or (4) has endangered the security of the property of any other person, or (5) has become dangerous to the peace of any community, then that official may send a notice forbidding persons within or without his jurisdiction to whom the posted individual may resort for alcoholic beverages from transferring such beverages to the posted individual. The notice provided for in the statutes is a writing which simply states that the addressee is forbidden to transfer alcoholic beverages to the individual named in the notice. Nothing further is stated in the notice. (See A. 116-117 for the terms of the statutes and A. 106-107 for the notice utilized in the instant case.)

Any damage due to loss of reputation that a posted individual might suffer due to the operation of these statutes is far more speculative and less concrete than the evidence of impending economic loss which was present in those cases in

which potential reputation loss was considered in determining the requirements of due process.

Extreme and immediate economic deprivation was present in some cases in which it was held that due process required a hearing, as, for example, the case of the individual who is denied or deprived of a license to practice his chosen profession, *Schware v. Bd. of Bar Examiners*, 353 U.S. 237 (1957) (lawyer); or the case where certain public employees were barred from future governmental employment by an Act of Congress specifically directing that public funds could not be paid to them, *United States v. Lovett*, 328 U.S. 303 (1946); or, in a recent case involving the right to a preliminary hearing, a welfare recipient's interest in "the very means by which to live . . . the means for daily subsistence." *Goldberg v. Kelly*, 38 Law Week 4223, 4225 (1970). In many less extreme situations yet with concrete evidence that future economic loss was likely to occur, the courts have found an interest in reputation cognizable in the due process balancing process of *Cafeteria Workers*, 367 U.S. 886 (1961).

In many less extreme situations, the courts have considered the plaintiff's interest in his reputation only after he has set forth definite reasons why his economic future would also be affected. For example, in *Birnbaum v. Trussell*, 371 F. 2d 672 (C.A. 2, 1966), the Court, Anderson, J., held that the interests of plaintiff physician were sufficiently great that due process required that he be given a hearing on the reasonableness of his dismissal from a public hospital staff on the grounds that he was racially prejudiced. Plaintiff alleged concrete evidence that his reputation and future employment opportunities were affected by the actions of defendant: he had been dismissed without a hearing from the staff of a public hospital in the midst of a controversy involving his treatment of Negro hospital workers; the defendant dismissing officers sent a letter to all

other municipal hospitals in the City instructing them not to place the plaintiff on their staffs, giving the accusations against plaintiff "a stamp of official authority" (371 F. 2d at 677) by the City Department of Hospitals; defendant president of the union of hospital workers of which the Negro workers were members "let it be known that they had secured his removal and continued, as part of a campaign to increase the membership of the union, to accuse him of abusing Negros." (371 F. 2d at 675-676) The court noted that:

> ". . . the courts have become more inclined to consider the causes of discharge and the methods and procedures by which a dismissal is effected as it may bear upon reputation and the opportunity for employment thereafter. It is quite clear that, in the circumstances surrounding Doctor Birnbaum's removal from office, more was involved than merely the loss of the privilege of public employment . . . ." (371 F. 2d at 677).

Similarly, in *Meridith v. Allen County War Memorial Hospital Commission,* 397 F. 2d 33 (C.A. 6, 1968), the Court, McCree, J., considered the potential damage to plaintiff physician's reputation in determining the requirements of due process. Plaintiff was discharged from the only hospital in the County on the basis of letters written by five other staff doctors alleging his general uncooperativeness, his refusal to handle emergency cases and his dismissal from various medical associations. The Court, citing *Cafeteria Workers,* supra, and *Birnbaum v. Trussell,* supra, found that plaintiff had a due process right to a fair hearing because:

> ". . . there appears to be a substantial likelihood that failure to reappoint plaintiff would foreclose him from practicing his profession, both because of the limited number of available hospitals in the area and because of the stigma which would result from a dismissal on the grounds mentioned in the letters of defendant physicians . . . ." (397 F. 2d at 36).

In *Olson v. Regents of University of Minnesota*, 301 F. Supp. 1356 (D. Minn. 1969) in which a 59 year old state employee with 14 years on the job was held to be entitled to a hearing upon being discharged for physically attacking his fellow employees, the Court, Neville, J., found that:

> "... His chances for employment elsewhere are therefore minimal after his discharge by the University ...." (301 F. Supp. at 1363).

In *Lucia v. Duggan*, 303 F. Supp. 112 (D. Mass. 1969), plaintiff school teacher's numerous inquiries to secure re-employment as a teacher, most of which were simply not answered, caused the Court, Garrity, J., to conclude that it was "fairly inferable" (303 F. Supp. at 116) that he would be unable to continue to be a school teacher. In *Endler v. Schultzbank*, 68 C. 2d 162, 436 P. 2d 297 (1968), defendant Commissioner of Corporations directed all of his licensees not to hire plaintiff finance company officer under pain of losing their licenses. Because finance companies were required to be licensed, the Supreme Court of California, Tobriner, J., found that defendant's actions had made it impossible for plaintiff to secure employment in California in the finance business. In *Parker v. Lester*, 227 F. 2d 708 (C. A. 9, 1955), plaintiff seamen, denied security clearances which were necessary for employment on merchant vessels, were found to be effectively barred from practicing their trade in the future.

While due process may require a hearing upon a concrete showing of the potential for future employment loss, the lack of such evidence has been considered (absent the loss of other significant rights) in determining that notice and hearing are not required by due process. Thus, in *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961), plaintiff was a short order cook on a military reservation and was denied a security clearance, thereby rendering her ineligible to enter the base where she was employed. The Court, Stewart, Justice, found:

> "Finally, it is to be noted that this is not a case where government action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity. [Citing cases] . . . There is nothing to indicate that this determination would in any way impair Rachel Brawner's employment opportunities anywhere else. . . ." (367 U.S. 898-899).

In *Freeman v. Gould Special School District of Lincoln County, Arkansas,* 405 F. 2d 1153 (C. A. 8, 1969), cert. denied 396 U.S. 843 (1969), plaintiff school teachers were fired for failing to cooperate with the school principal. The school board had offered to rehire them if they could resolve their differences with the principal. No allegation was made of any possible loss of future employment and the Court, Gibson, J., found (405 F. 2d 1160) that plaintiffs were only asserting a right to specific employment at the school where they had been working. In finding (405 F. 2d 1160) that the school board was not required to give plaintiffs a hearing, the Court noted that:

> ". . . Absent statutory or contractual requirements, persons discharged for inefficiency, incompetency, or insubordination have no constitutional right to a hearing with rights of cross examination and confrontation of witnesses." (405 F. 2d 1161).

In *Chafin v. Pratt,* 358 F. 2d 349 (C.A. 5, 1966), cert. denied, 385 U.S. 878 (1966), plaintiff was involuntarily retired without notice or a hearing from her position with the Federal government. She was retired because she had been found to be mentally unfit for her job on the basis of *intra*office memoranda and reports and the confidential report of a psychiatrist who had examined her. In upholding the validity of her retirement against plaintiff's due process challenge, the Court, Brown, J., noted that "When we similarly [to *Cafeteria Workers v. McElroy,* supra] weigh the competing interests in this case, it is clear that no hearing was required. Appellant has not lost

the right to work elsewhere as a secretary. . . ." (358 F. 2d at 357). In *Parker v. Board of Education of Prince George's County, Md.*, 237 F. Supp. 222 (D. Md., 1965), aff'd per curiam, 348 F. 2d 464 (C.A. 4, 1965), cert denied 382 U.S. 1030 (1966), rehearing denied, 383 U.S. 939 (1966), plaintiff probationary school teacher's employment contract was not renewed allegedly because plaintiff had assigned his pupils a book thought by defendant school board to be objectionable. Plaintiff asserted that defendant's failure to renew his contract without notice and a hearing violated his right to due process. In upholding the actions of the school board, the Court, Thomsen, C. J., citing *Cafeteria Workers v. McElroy*, supra, said that "In the instant case the termination of plaintiff's contract denied him only the right to work in the public schools of one of the counties in Maryland. It did not destroy his legal right to pursue his profession elsewhere in the State, or in any other state, or even in a private school in Prince George's County." (237 F. Supp. at 228).

For the above reasons and because of the above cases, even if matters concerning possible damage to reputation due to the operation of Wisconsin's posting statutes were properly before the lower court, that court decided these matters erroneously.

IV

A CONSIDERATION OF THE ALTERNATIVES AVAILABLE BOTH TO THE STATE AND TO THE POSTED INDIVIDUAL IS RELEVANT IN DETERMINING THE REQUIREMENTS OF DUE PROCESS

The preceding sections have dealt with the lack of damage to a posted individual's economic alternatives after he was posted in accordance with the statutes in question. It is also relevant to a consideration of the requirements of due process to

look at the reasonableness of the means chosen by the State to obtain a legitimate goal of its police power, namely, that of limiting the noxious effects caused by the excessive drinking of alcoholic beverages by individuals. It is also relevant to look at the alternative means of review and relief available to the posted individual from actions taken under these statutes.

The goal of the State in passing the posting statutes was to limit the noxious effects that excessive drinking can have upon the drinker, his family or upon the community within which he resides. The statutes vest posting authority in local persons and officials because they are in the best position to be aware of what is essentially a local problem. Also, the statutes provide adequate standards to guide the actions of the posting official or person. Secondly, the statutes place prohibitions and penalties only upon those serving the excessive drinker, and not upon the drinker himself. No prohibitions are placed upon the attempted purchase of alcoholic beverages by any posted person, although such prohibitions are provided for in the statutes of some other states (see sec. 202.100 (2), Revised Statutes of Nevada; Jurisdictional Statement, 23a). Only those persons receiving the notice are barred from transferring alcoholic beverages to the posted individual. The statutes represent a reasonable and restrained method for the State to meet a valid objective of its police powers, namely, the control of the noxious effects of excessive drinking by individuals. The reasonableness of this method utilized by Wisconsin to control this serious social problem is highlighted by the fact that fifteen other states employ virtually the same method found in the statutes in question. (See Jurisdictional Statement, App. E, 17a-30a.)

It is also relevant to a determination of the requirements of due process to consider the alternatives remaining to the posted individual. The statutes withdraw for one year the liberty

of the posted individual to obtain alcoholic beverages from persons or establishments receiving the requisite notice of posting. The posted individual is, however, free to consume alcoholic beverages purchased prior to the posting, or received from persons or establishments which have not been sent the posting notice, or obtained in other states. Thus, the liberty of the posted individual to consume alcoholic beverages has only been limited and has not been withdrawn completely. Alternative means of obtaining alcoholic beverages, albeit possibly impractical ones, are available to the posted individual.

A person who has been posted under the statutes in question has numerous alternatives to any arbitrary posting done by a local official not acting in good faith. The individual may have an action at law in Federal court (28 U.S.C. §1343 (3); 42 U.S.C. §1983) as Mrs. Constantineau has asserted in her first cause of action (A. 102-106). Such an action could demand punitive and compensatory damages due to any arbitrary and malicious actions taken pursuant to the posting statutes (A. 105-106). A posted individual could also bring an action in the state courts for damages against any local official empowered under the posting statutes, whether he was acting arbitrarily or in good faith. *Holytz v. City of Milwaukee,* 17 Wis. 2d 26, 115 N.W. 618 (1962). In *Sessions v. State of Connecticut,* 293 F. Supp. 834, 838 (D. Conn., 1968), aff'd per curiam, 404 F. 2d 342 (C.A. 2, 1968), the Court, Clarie, J., noted that:

> ". . . whatever interests he had in his employment which were entitled to legal protection, e.g., reputation and vested pension rights, could still be safeguarded against arbitrary state action by a proper remedy in the state courts. All that the Personnel Appeal Board could finally adjudicate was whether or not the petitioner was entitled to remain in the public employ. . . ."

In Wisconsin, a local unit of government is obligated to pay any judgments obtained against its officials for actions taken by them in good faith. Sec. 270.58, Wis. Stats.

A further remedy available to an individual posted under the statutes in question lies in the fact that he could seek judicial review of the reasonableness of the official's actions by writ of certiorari. *Wurth v. Affeldt,* 265 Wis. 119, 126, 60 N.W. 2d 708 (1953). By such a review by a common-law writ of certiorari, a posted individual could challenge the actions of a local official in posting him on the grounds that such action was arbitrary, oppressive, unreasonable, or that the evidence was not sufficient to justify his actions. *State ex rel. Ball v. McPhee,* 6 Wis. 2d 190, 199-200, 94 N.W. 2d 711 (1958); *State ex rel. Progresso Development Company v. Wisconsin Real Estate Broker's Board,* 202 Wis. 155, 168, 231 N.W. 628 (1930). The Court in *Sessions v. Connecticut,* 293 F. Supp 834 (D. Conn., 1968), aff'd per curiam, 404 F. 2d (C.A. 2, 1968), in considering the requirements of due process, noted that the plaintiff could have sought review of the dismissing agency's actions by writ of mandamus.

> "It should be noted also, that while the findings of the Appeal Board are unreviewable, an aggrieved party does have the remedy of mandamus available, to insure against the board's acting illegally or arbitrarily." (293 F. Supp. 839)

If a posted individual's sole reason for desiring a hearing were to present his or her side of the case for public consumption, this objective could be served by issuing a statement to the press. *Hosack v. Smiley,* 276 F. Supp. 876, 881 (D. Colo., 1967), aff'd per curiam, 390 U.S. 744 (1968).

Finally, since all of the officials given posting powers under these statutes are elected officials, with the exception of the chief of police and the county superintendent of the poor

[welfare department], the latter two officials serving at the pleasure of elected officials, a posted individual may have some political recourse against the official posting him.

Thus, while few alternative means other than the one represented by the statutes in question were available to the State to achieve its legitimate objective, namely, limiting the noxious effects of excessive drinking by certain individuals, posted individuals do have numerous legal, non-legal and political remedies available to them upon being posted. These alternatives must be considered in determining whether the statutes in question satisfy the requirements of due process.

V

WISCONSIN'S ALCOHOLIC POSTING STATUTES SATISFY THE REQUIREMENTS OF DUE PROCESS WHEN THE INTERESTS OF THE STATE ARE BALANCED AGAINST THE INTERESTS OF THE POSTED INDIVIDUAL

In order to determine whether due process requires notice and a hearing in the instance where an individual is posted under Wisconsin's posting statutes, it is necessary to weigh the interests of the State against the interests of the posted individual. These interests have been analyzed in the preceding discussion. However, it is also relevant to view recent cases in which the balancing of interests test was employed. These cases reveal instances in which private interests far more significant than the interests of individuals posted under these statutes were validly withdrawn without notice and a hearing. These cases also reveal instances in which no notice and hearing were required despite the fact that the governmental interests involved were not as great as the State's interest in this case in controlling the noxious effects of excessive drinking.

In *Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961), plaintiff Rachel Brawner had been employed as a short-order cook for more than six years in a cafeteria operated by her employer on the premises of a military base. Her employer had been entirely satisfied with her employment performance. The Court by Stewart, Justice, in effect held that plaintiff's right to continue in this job could be withdrawn without notice and a hearing when it upheld the base commander's withdrawal, without notice and a hearing, of plaintiff's identification badge, without which she could not enter the base.

Government action which serves to increase substantially the competition which a business is subjected to may be taken by the government without notice and a hearing. In *Law Motor Freight, Inc. v. Civil Aeronautics Board,* 364 F. 2d 139 (C.A. 1, 1966) cert. denied, 387 U.S. 905 (1967), defendant board's order, promulgated without granting plaintiff business a hearing, served to increase substantially the competition to plaintiff's motor freight carrying business. The Court, Coffin, J., in denying plaintiff's due process claim for a hearing, cited *Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961), in addressing itself to the question of "whether such vital rights to life, liberty, or property were involved as to invoke the constitutional due process mandate for a hearing." (364 F. 2d 144.) In *Fugazy Travel Bureau, Inc. v. Civil Aeronautics Board,* 350 F. 2d 733 (C.A., D. C., 1965), the Court, Tamm, J., upheld an agreement made between defendant board and the scheduled airlines which required plaintiff travel agency to substantially amend its business and accounting procedures. The Court cited *Cafeteria Workers v. McElroy,* supra, and applied its balancing test in determining that due process did not require the granting of a hearing to plaintiff, despite plaintiff's claims that the plan would "drive it out of business . . . ." (350 F. 2d 737) In *Continental Bank v. National City Bank,* 245 F.

Supp. 691 (E.D. Ohio, 1965), the National City Bank made an application to defendant Comptroller of Currency for permission to establish a branch directly across the street from plaintiff Continental Bank, thereby greatly increasing the competition faced by Continental Bank. The Court, Battisti, J., after applying the balancing test to determine the requirements of due process, held that Continental Bank's right to be free from economic competition was not a sufficiently great right to entitle it to a hearing on the matter of National City Bank's application.

In *Rose v. Haskins,* 388 F. 2d 91 (C.A. 6, 1968), cert. denied, 392 U.S. 946 (1968), the plaintiff parollee was held not entitled to a hearing prior to the revocation by defendant of his parole for violations of the conditions of that parole. Despite the fact that defendant's actions resulted in plaintiff's return to prison, the Court, Weick, C.J., held that plaintiff was not entitled to a hearing.

Also, as discussed previously, a public employee may be discharged without notice and a hearing from his job, as long as the conditions of his discharge do not affect his future employment possibilities. *Cafeteria Workers v. McElroy,* 367 U.S. 886, 896-898 (1961).

The rights affected in the above cases are far more substantial and significant in nature than those rights of a posted individual which are affected by the operation of Wisconsin's posting statutes. Despite this fact, those significant economic and personal rights involved in the above cases were held to have been validly withdrawn from their holders by government action taken without a hearing. It follows logically that those rights of an individual which may be affected by operation of the statutes in question should also be able to be withdrawn validly without notice and a hearing.

Furthermore, in *Lewis v. City of Grand Rapids*, 356 F. 2d 276 (C.A. 6, 1966), cert. denied, 385 U.S. 838 (1966), the Court, O'Sullivan, J., seemed to imply that, in terms of the requirements of due process, there was a distinction between economic interests, such as those interests which were withdrawn in the above-cited cases, and those interests associated with traffic in intoxicating liquors.

> "The United States Supreme Court, in recent decisions, has been exacting in its requirements of due process before a state agency may deny entrance of citizens into the practice of a profession or other calling, such as the practice of law, [citing cases] . . . . None of these decisions, however, can be read to control the case of an application for transfer of a liquor license. The traditional municipal interests in regulating the liquor business, together with the problems of conducting this regulation through competent, civic-minded, part-time officials, require the use of flexible procedures. . . ." (356 F. 2d at 286)

A review of recent cases utilizing the balancing test of *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961), to determine the requirements of due process, indicates that a hearing was held not to have been required in many instances where the private interests withdrawn were more substantial in nature than those interests of an individual which may be affected by operation of the statutes in question. Therefore, both upon an application of the balancing test itself, and upon a comparison of the rights of an individual which may be affected by operation of Wisconsin's posting statutes with those rights which have been held to have been withdrawn validly without the granting of notice and a hearing, reason compels one to conclude that the requirements of due process have been met by the terms of Wisconsin's posting statutes.

VI

THE STATE HAS AN INTEREST IN ECONOMY AND IN THE SMOOTH, PRACTICAL OPERATION OF ITS EVERYDAY AFFAIRS, AND THIS INTEREST WOULD BE ADVERSELY AFFECTED BY REQUIRING A HEARING FOR EVERY GOVERNMENTAL ACTION TAKEN WHICH AFFECTS A PRIVATE RIGHT, HOWEVER MINIMAL THAT RIGHT MAY BE

The State has a definite interest in being able to take some low-level actions, such as actions taken under the statutes in question, without having to hold a hearing. The everyday, practical operations of government will be greatly disrupted and the costs of government will be greatly increased if a hearing must be held in conjunction with every action which it takes. The State has a definite interest in the smooth operation of its everyday activities and in the economy of its operations, and this interest should be considered by the Court in applying the due process balancing test. In *Sessions v. State of Connecticut*, 293 F. Supp. 834 (D. Conn., 1968), aff'd. per curiam, 404 F. 2d. 344 (1968), the Court, Clarie, J., in speaking of the requirement of a formal, judicial-type hearing, made a statement which is relevant here.

> " 'The Court has consistently recognized that * * * the interest of a government employee in retaining his job, can be summarily denied. It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer.' *Cafeteria and Restaurant Workers Union Local 473, AFL-CIO v. McElroy* [supra].
>
> "Were the law otherwise, the employment status of any governmental employee could not be terminated without subjecting the employer to a protracted judicial

hearing. This would impose a prohibitive burden on the employer and result in a substantial reduction in government work production standards. Administrators would generally accept an inferior service, rather than be subjected to the rigors of a judicial hearing, where evidential proof would be required to justify their administrative personnel decisions." (293 F. Supp. 837-838).

This same point was discussed in more depth in Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1453-1454 (1968):

". . . On the other hand, as matters currently stand, constitutional claims to procedural due process in the public sector are not absolute, and even important private interests can still be taken away without an adequate hearing. It is as yet unclear whether the doctrine of unconstitutional conditions will import a right to procedural due process in all cases or only when the administrative decision rests prima facie on some basis violative of an explicit collateral right (such as freedom of speech); if the more limited view is adopted, the doctrine itself would be insufficient to establish procedural safeguards against decisions which are wholly unreasonable but do not imperil such explicit rights.

"Moreover, the additional benefits to be gained even from an absolute right to procedural due process are limited. Although the right to some form of process may be absolute, the extent to which particular safeguards are available nonetheless varies according to the circumstances. Where the consequence of error is relatively insubstantial, protection against the risk of error through the use of elaborate quasi-judicial procedures is subject to a constitutional trade-off with the need for administrative and fiscal economy. A student who stands in peril of outright expulsion, just as a job applicant need not receive the same type of circumspect hearing as a long-time employee whose employment alternatives have dwindled away and who is faced with the threat of discharge. In addition,

where substantive statutory standards have been met--or where there are no such standards--and there is no recognized constitutional infringement, the right to procedural due process will not serve to expand substantive rights . . . ." [The writer then concluded that "a right to procedural is desirable" (p 1454)].

The Court should consider this additional interest of the State in being able to run smoothly and economically its everyday operations. Many of the routine operations of the State may affect some minimal private rights of citizens, such as those rights which are affected by the operation of these posting statutes, and the State should be able to conduct such operations without having to undergo the inconvenience and expense of providing notice and a hearing.

The Court should remember, after all, that "It cannot be contended either that due process *never* requires notice, a hearing, a confrontation, and right to cross examine, or that it *always* requires such procedure." *Murray v. Vaughn*, 300 F. Supp. 688, 706 (D. R.I., 1969) (Pettine, J.).

CONCLUSION

For the reasons stated above, it is respectfully submitted that the judgment of the United States District Court for the Eastern District of Wisconsin should be reversed.

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